IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AKHIL BANSAL, **Plaintiff,** **v.** **DRUG ENFORCEMENT ADMINISTRATION, et al.,** **Defendants.**	**CIVIL ACTION** **NO. 06-3946**

MEMORANDUM & ORDER

Katz, S.J. **February 16, 2007**

Plaintiff Akhil Bansal has brought this Freedom of Information Act ("FOIA") action against the Drug Enforcement Administration ("DEA"), the Federal Bureau of Investigation ("FBI"), the Internal Revenue Service ("IRS"), and the Executive Office of United States Attorneys ("EOUSA"). Before the court is the Government's Motion to Dismiss or in the Alternative for Summary Judgment. The court will grant Defendant's Motion in part and deny it in part.

I. FACTS

Plaintiff was one of seventeen co-defendants charged in a multi-million dollar international drug trafficking operation. See United States v. Bansal, No. 2:05-cr-0193 (E.D.Pa.), Dkt. No. 1 (Sealed Indictment); Dkt. No. 479 (Memorandum dated March 1, 2006, describing scope of criminal enterprise). He was indicted after an investigation involving multiple federal agencies, and was

convicted after a five-and-a-half week trial.

Since his conviction, Plaintiff has submitted numerous FOIA requests seeking documents related to his criminal investigation. Specifically, Plaintiff submitted three FOIA requests to the DEA, dated April 7, 2006, April 19, 2006, and May 19, 2006. By letter dated July 19, 2006, the DEA acknowledged his requests for documents and denied his request for a waiver of fees. Plaintiff has not appealed that denial. The DEA has not sent any further correspondence to Plaintiff.

Plaintiff also submitted a FOIA request to FBI Headquarters dated April 7, 2006. By letter dated May 5, 2006, the FBI Headquarters advised Plaintiff that a search of the automated indices to the agency's central records system files had located no records responsive to his request. Plaintiff appealed this finding, and by letter dated May 31, 2006, from the Office of Information and Privacy, the agency acknowledged his appeal and informed him he would be notified of a decision on his appeal as soon as possible. The FBI has not yet ruled on his appeal.

Additionally, Plaintiff submitted a FOIA request to the IRS dated April 7, 2006. By letter dated May 18, 2006, the IRS informed plaintiff that the agency could not process his request because the request did not reasonably describe the

documents sought and did not meet the requirements of the FOIA. The letter requested additional information, proof of identity, and proof of his right to access the requested records. In response, Plaintiff mailed the IRS a letter dated May 25, 2006, which contained additional information concerning his request but not proof of his identity.

Finally, Plaintiff submitted two FOIA requests to EOUSA. In response to the first, by letter dated May 8, 2006, EOUSA requested additional information. Plaintiff appealed this response by letter dated May 11, 2006 and included additional information regarding his request. By letter dated May 31, 2006, the agency acknowledged Plaintiff's appeal. On May 12, 2006, Plaintiff submitted a second FOIA request to EOUSA, this time requesting documents from the Eastern District of Pennsylvania and referencing his criminal case docket number.

By letter dated July 21, 2006, EOUSA acknowledged the second request and informed plaintiff that because of the breadth of the request it would take approximately nine months to compile the documents requested. On September 20, 2006, EOUSA notified Plaintiff that his request for a fee waiver had been denied. The letter further requested advance payment of $3,360.00, explaining that processing his request would require approximately 120 hours beyond the two hours already provided at no charge. Plaintiff appealed this response, and EOUSA

acknowledged his appeal. To date, Plaintiff has not made any payment of fees to EOUSA.

Plaintiff filed the instant Complaint on September 8, 2007. In his Complaint, Plaintiff alleges that he has exhausted his administrative remedies. Complaint.

II. Discussion

Defendants' primary argument is that Plaintiff has failed to exhaust his administrative remedies. "Failure to exhaust is in the nature of statutes of limitation and does not affect the District Court's subject matter jurisdiction." Anjelino v. New York Times Co., 200 F.3d 73, 87 (3d Cir. 1999). Failure to exhaust defenses should be considered under Rule 12(b)(6), rather than under Rule 12(b)(1). Id; see also Hidalgo v. F.B.I., 344 F.3d 1256, 1260 (D.C. Cir. 2003) (holding that, absent exhaustion, a FOIA suit is subject to dismissal under Rule 12(b)(6)). Because resolution of the exhaustion issue will require consideration of matters outside the pleadings, the court will apply the summary judgment standard. See FED. R. CIV. P. 12(b).[1]

A. Legal Standard

[1]In the alternative, the Court grants this Motion under Rule 12(b)(1) for the reasons stated in this memorandum.

Summary judgment is appropriate where the moving party, through affidavits, depositions, admissions, and answers to interrogatories, demonstrates that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Jalil v. Advel Corp., 873 F.2d 701, 70 (3d Cir. 1989), cert. denied, 110 S.Ct. 725 (1990); FED. R. CIV. P. 56(c). The moving party has the burden of demonstrating the absence of genuine issues of fact, with all reasonable inferences from the record in favor of the nonmoving party. Jalil, 873 F.2d at 706; Anderson v. Liberty Lobby, 447 U.S. 242, 255 (1986).

Rule 56 mandates that summary judgment must be entered "against a party who fails to make a showing sufficient to establish existence of an element essential to that party's case and on which that party will bear the burden of proof at trial." Celotex Corp. V. Catrett, 477 U.S. 317, 322 (1986). To establish that a triable fact does exist, the nonmoving party must point to specific evidence in the record that supports each essential element of its case. Id. at 322-23; Childers v. Joseph, 842 F.2d 689, 694-95 (3d Cir. 1988). In doing so, a party cannot merely restate the allegations of its complaint, nor rely on self-serving conclusions that are unsupported by specific facts in the record. Celotex, 477 U.S. at 322-23; Matsushita Electric Industrial Co. v. Zenith Radio, 475 U.S. 574, 586-87 (1986).

B. Exhaustion of Administrative Remedies

To prevail in court on a FOIA request a plaintiff must establish that he has made a request for records which reasonably describes such records and is in accordance with published rules, and that the agency has withheld such records in violation of the standards established by Congress. See 5 U.S.C. § 552(a)(3)(A) (providing that "each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to the requester"). Thus, a requester under FOIA who has failed to comply with administrative requirements has not exhausted administrative remedies for purposes of bringing an action in federal court. See Pollack v. Dept. of Justice, 49 F.3d 115, 116 (4th Cir. 1995).

C. IRS -Administrative Exhaustion

Plaintiff has not exhausted his administrative remedies with respect to his FOIA request to the IRS because his FOIA request was not accompanied by proper identification as required by Department of Treasury regulations. See Hinojosa v. Department of Treasury, No. Civ. A. 06-0215, 2006 WL 2927095, *4 (D.D.C. Oct. 11, 2006) ("A requesting party must comply with both FOIA and the requirements imposed by individual agencies before the agency can release the

requested documents"). The FOIA, 5 U.S.C. § 552(a)(3), provides that a request must be made "in accordance with published rules stating the time, place, fees (if any), and procedures to be followed." 5 U.S.C. § 552(a)(3). The IRS has set forth the rules and procedures to be followed 26 C.F.R. § 601.702. These rules state, in relevant part, that:

> Persons requesting access to such records which pertain to themselves may establish their identity by--
>
> (1) The presentation of a single document bearing a photograph (such as a passport or identification badge), or the presentation of two items of identification which do not bear a photograph but do bear both a name and signature (such as a credit card or organization membership card), in the case of a request made in person,
>
> (2) The submission of the requester's signature, address, and one other identifier (such as a photocopy of a driver's license) bearing the requester's signature, in the case of a request by mail, or
>
> (3) The presentation in person or the submission by mail of a notarized statement, or a statement made under penalty of perjury in accordance with 28 U.S.C. 1746, swearing to or affirming such person's identity.

26 C.F.R. § 601.702

This requirement was explained by the IRS in a letter dated May 18, 2006, in response to Plaintiff's FOIA request. To date, Plaintiff has not provided identification as required by the statute. Thus, he has not exhausted his administrative remedies as to his IRS request.

Plaintiff argues that he has constructively exhausted his administrative remedies, because Defendant IRS did not properly respond to his request and inform him of right to appeal. Because Plaintiff "did not properly submit his request, however, it is as if he had made no request at all on which the IRS could render a determination." Kessler v. United States, 899 F. Supp. 644, 645 (D.D.C. 1995) (dismissing claims under FOIA against IRS for failure to administratively exhaust his claims because Plaintiff's request did not comport with agency regulations). Thus, the Court will grant summary judgment against Plaintiff as to his claim against the IRS.

D. EOUSA

1. Administrative Exhaustion

To the extent Plaintiff challenges the EOUSA's refusal to produce the documents he has requested, he has not exhausted his administratively remedies. See Oglesby v. United States Dep't of Army, 920 F.2d 57, 66 (D.C. Cir. 1990) ("Exhaustion does not occur until the required fees are paid or an [administrative] appeal is taken to the refusal to waive fees."). The regulations governing FOIA requests to the Department of Justice provide that in cases in which the estimated fee exceeds $250.00, the agency may require an advance payment of the entire estimated amount before beginning to process the request. 28 C.F.R. §

16.11(i)(2). Further, the request shall not be considered received until the required payment is received. 28 C.F.R. § 16.11(i)(4).

In his response to his FOIA request, the EOUSA notified Plaintiff that his request for a fee waiver had been denied. Plaintiff was further informed that processing his FOIA request would require approximately 120 hours of search time and that he would be required to pay $3,360.00.

Plaintiff argues that Defendant EOUSA has waived any claim that he did not exhaust his administrative remedies because it did not request payment until after he filed suit. But, "[r]egardless of whether the plaintiff 'filed' suit before or after receiving a request for payment, the plaintiff has an obligation to pay for the reasonable copying and search fees assessed by the defendant." Trueblood v. U.S. Dep't of Treasury, I.R.S., 943 F.Supp. 64, 68 (D.D.C. 1996) (citing Pollack v. Dep't of Justice, 49 F.3d 115, 119-20 (4th Cir.1995)). Thus, to the extent Plaintiff challenges the EOUSA's failure to produce the documents requested, Plaintiff has failed to exhaust administrative remedies, because he has not paid the required fees.

2. Merits of Fee Calculation and Fee Waiver Denial

Plaintiff has also appealed the computation of the fee and the denial of the fee waiver. See Govt. Ex. 4(E). Such claims have been administratively

exhausted, so the court will consider the merits of these claims under the summary judgment standard.

a. Calculation of Fees

The evidence, even in the light most favorable to Plaintiff, demonstrates that the government's fee estimate is accurate, despite Plaintiff's argument that the government's estimate that it will take approximately 120 hours to process his request cannot be accurate. Govt. Ex. 4(D).

Documents responsive to Plaintiff's requests are contained in approximately ten file cabinets of five drawers each, along with twelve compact discs containing approximately two additional file cabinets worth of material, or the equivalent of 60 file drawers. Govt. Ex. 4(F), ¶¶ 4-6 (Declaration of Susan Falken). Each of these file drawers must be manually searched by an employee of the United States Attorney's Office to identify documents pertaining to Plaintiff's requests. The law librarian in charge of Plaintiff's request estimates that it would take her approximately two hours to search each file drawer of documents. Id., ¶ 7. One hundred twenty hours of work at $28 per hour yields an estimated fee of $3,360.00.

Plaintiff has not produced any evidence to contradict the evidence put forth by Defendants, only mere supposition that the time for searching is exaggerated.

Accordingly, there are no genuine issues of material fact with respect to the estimated search fee, and summary judgment should be entered in favor of the EOUSA as to the issue of fee calculation.

b. Denial of Fee Waiver

Plaintiff also challenges EOUSA's denial of his request for a fee waiver. FOIA provides that documents shall be furnished without charge or at a reduced rate "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. §552(a)(4)(A)(iii). "In any action by a requester regarding the waiver of fees under this section, the court shall determine the matter de novo: *Provided*, That the court's review of the matter shall be limited to the record before the agency." 5 U.S.C. § 552(a)(4)(A)(vii).

Plaintiff provides the following basis for his request for a fee waiver:

> I believe my request qualifies for a waiver of fees since the release of requested information would primarily benefit the general public and be "in the public interest;" notwithstanding the fact that I am an indigent person, and need these materials to perfect an appeal of what I perceive as an unjust conviction.
> Cpt., Ex. A.

Plaintiff's explanation of his need for the documents does not provide any

basis for concluding that disclosure of the requested information would contribute *significantly* to public understanding of the operations or activities of government. Plaintiff seeks the information for use in his criminal appeal. A criminal defendant's access to his personal investigative file primarily serves his own interests. See McClain v. U.S. Dep't of Justice, 13 F.3d 220, 221 (7th Cir. 1993); Schulz v. Hughes, 250 F. Supp. 2d 470 (E.D. Pa. 2003) (holding that a federal inmate's request for all United States Probation Office records that mentioned his name, government records providing statistics about delays in criminal trials and other proceedings, and information about persons in custody due to federal prosecution in Camden, New Jersey would primarily serve the inmate's individual interests); cf. McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1287 (9th Cir. 1987) (holding that the court will consider disclosure less likely to contribute significantly to public understanding where a requester seeks information merely to advance private lawsuits or administrative claims).

Plaintiff contends the records he seeks "are proof of corrupt government practices and misconduct by the agents and officers of the government." Govt. Ex. 4(D), ¶ II(a). Specifically, the corrupt practices and misconduct he believes will be revealed include "unlawful subpoenas," illegal warrantless wiretapping and warrantless searches in his criminal case. Govt. Ex. 4(D), ¶ II(b). Plaintiff,

however, raised all of these claims in his criminal prosecution. See United States v. Bansal, No.2:05-cr-0193, Dkt. Nos. 427, 433, 479, and 648 (orders denying motions to suppress evidence obtained through allegedly illegal wiretaps and searches). Thus, his allegations of government corruption and misconduct are already on the public record. See McClain v. U.S. Dept. of Justice, 13 F.3d 220, 221 (7th Cir. 1993) (considering the fact that the individual requesting documents raised his contentions of government abuses at his criminal trial in determining that further disclosure of information would not contribute significantly to the public's understanding of government operations). Moreover, Plaintiff offers no evidence that he has the capacity to disseminate the information he seeks to the public, beyond using it in his appeal.

Finally, the court notes that there is no special provision in FOIA for reduced fees based on indigence or incarcerated status. Schulz, 250 F. Supp. 2d at 474 (citing Ely v. Postal Service, 753 F.2d 163, 165 (D.C. Cir.1985) (per curiam)), cert. denied, 471 U.S. 1106, 105 S.Ct. 2338, 85 L.Ed.2d 854 (1985)).

The evidence of record in this case establishes that disclosure of the information Plaintiff requests will not contribute significantly to public understanding of the operations or activities of the government. Accordingly, this Court shall enter summary judgment in favor of the Executive Office of United

States Attorneys on the issue of Plaintiff's request for a fee waiver.

E. DEA - Administrative Exhaustion

The government further argues that Plaintiff has not exhausted his administrative remedies with regard to his DEA claim, because he has not appealed the denial of his fee waiver request. The court disagrees. Although Plaintiff has not exhausted administrative remedies sufficiently to challenge the Agency's denial of his fee waiver, Plaintiff here seeks review of DEA's failure to produce any documents in response to his request.

The Plaintiff was not required to appeal the DEA's failure to provide the requested documents, because the DEA has not provided a FOIA response sufficient for the purposes of requiring an administrative appeal. A FOIA response is only "sufficient for purposes of requiring an administrative appeal if it includes: 1) the agency's determination of whether or not to comply with the request; 2) the reasons for its decision; and 3) notice of the right of the requester to appeal to the head of the agency if the initial agency decision is adverse." Anderson v. U.S. Postal Service, 7 F. Supp. 2d 583, 586 (E.D.Pa. 1998) (citing Oglesby, 920 F.2d at 65.) Here, Plaintiff received a vaguely positive response in response to his request for documents notifying him that his request was on a list of documents awaiting processing. See Anderson, 7 F. Supp. 2d at 586 (holding

that a similar response was not sufficient to require an administrative appeal). At no time since has the DEA informed Plaintiff that it would not comply with his document request. Thus, Plaintiff was not required to administratively appeal before challenging the DEA's failure to provide any documents.

Moreover, it cannot be argued at this time that Plaintiff has failed to exhaust administrative remedies for failure to pay the required fees, because the DEA has not yet notified Plaintiff of the estimated fees for his request. Department of Justice regulations state that "[w]hen a component determines or estimates that the fees to be charged under this section will amount to more than $25.00, the component shall notify the requester of the actual or estimated amount of the fees, unless the requester has indicated a willingness to pay fees as high as those anticipated." 28 C.F.R. § 16.11(e). Here, there is no evidence that DEA has complied with this Agency regulation, and thus, it cannot be said fairly that Plaintiff has failed to pay the requested fees. See Sliney v. Federal Bureau of Prisons, Civ. A. No. 04-1412, 2005 WL 839540, *4 (D.D.C. Apr. 11, 2005) (denying summary judgment for failure to exhaust administrative remedies where Defendant had not notified the requester of the fee as required by Agency regulations). Thus, the court will not grant summary judgment on this count.

F. FBI - Administrative Exhaustion

Defendants argue that Plaintiff has not exhausted his administrative remedies because he improperly sent the request to FBI headquarters, rather than to the particular field office in which the records are held.

Defendants are correct that to the extent Plaintiff requests documents maintained by a field office, Plaintiff has not exhausted his administrative remedies, because he has failed to comply with the FBI's published regulations. The regulations state that "[f]or records held by a field office of the Federal Bureau of Investigation (FBI) . . . . you must write directly to that FBI. . . .field office address, which can be found in most telephone books or by calling the component's central FOIA office." 28 C.F.R. § 16.3(a); Ray v. F.B.I., 441 F. Supp. 2d 27, 32 (D.D.C. 2006) ("A request for records maintained by a particular FBI field office must be submitted directly to that field office."). Plaintiff in this case never filed a FOIA request with the Philadelphia field office of the FBI, he filed only with FBI Headquarters. See Schwarz v. United States Dep't of Treasury, 131 F. Supp. 2d 142, 148 (D.D.C. 2000) (noting that "courts have upheld agency requirements that a request for records be made in the first instance to the individual office in which the records may be kept").

Plaintiff, however, has exhausted his administrative remedies to the extent he is challenging the adequacy of the search conducted by FBI

headquarters. See e.g., Ray,441 F. Supp. 2d at 32. Although the "FBI is not obligated to undertake a search of its field offices' records when a requester submits his request only to its headquarters, Ray, 441 F. Supp. 2d 27, 32 (citing Oglesby v. United States Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir.1990), Defendant FBI has not met its burden of demonstrating that its search was reasonably calculated to uncover all relevant documents. Thus, the court will not grant summary judgment in favor of Defendant FBI.

III. Conclusion

For the reasons stated above , the court will grant Defendants' Motion in part and deny it in part. An appropriate Order follows.

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O R D E R

AND NOW, this 16th day of February, 2007, upon consideration of Defendant's Motion to Dismiss or in the Alternative for Summary Judgment, and the response thereto, it is hereby **ORDERED** that said Motion is **GRANTED IN PART and DENIED IN PART.**

1. Plaintiff's claims against Defendant IRS are **DISMISSED**.

2. Plaintiff's claims against Defendant EOUSA are **DISMISSED**.

3. As to all other claims, Defendants' Motion is **DENIED**.

BY THE COURT:

/s/ Marvin Katz

MARVIN KATZ, S.J.